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(81,858)

Supreme Court of the United States

OCTOBER TERM, 1925

(No. 885)

No. 185 on the Summary Docket

OCTOBER TERM, 1926

WILL MOORE,

Insurance Commissioner of the State of Oregon,

Appellant,

vs.

**FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, HARTFORD ACCI-
DENT AND INDEMNITY COMPANY,
and NATIONAL SURETY COMPANY.**

*Appeal from the District Court of the United States
for the District of Oregon.*

Brief of Appellant

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The opinion of the United States District Court for the District of Oregon is reported in 3 Fed. (2d) 652.

(31,358)

Supreme Court of the United States

OCTOBER TERM, 1925

(No. 635)

No. 185 on the Summary Docket
OCTOBER TERM, 1926

WILL MOORE,

Insurance Commissioner of the State of Oregon,
Appellant,

vs.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, HARTFORD ACCI-
DENT AND INDEMNITY COMPANY,
and NATIONAL SURETY COMPANY.

*Appeal from the District Court of the United States
for the District of Oregon.*

Brief of Appellant

The Statement of the Grounds on Which the Jurisdiction of this Court Is Invoked

A final decree of the District Court of the United States for the district of Oregon was entered on May 18, 1925, (R. 22), granting a permanent injunction in a suit in which the relief sought *inter alia* was an injunction suspending and restraining the execution of an order (R. 8.) made by the Department of Insurance of the State of

Oregon, an administrative board or commission acting under and pursuant to the statutes of the State of Oregon, upon the ground of the unconstitutionality of such order. An interlocutory writ of injunction was prayed for preliminary until the hearing of said cause and permanent thereafter, upon the same ground and for the same relief.

The order of the Department of Insurance of the State of Oregon, known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," (R. 24), cancelled and annulled the authorization and license theretofore issued by the appellant's predecessor in office to the appellees herein, permitting the appellees to underwrite contracts of insurance commonly designated as confiscation bond or coverage on vehicles sold on conditional sale contract (R. 2), retaining the title in the vendor. Such contracts of insurance indemnify the vendor against loss caused by confiscation of auto-vehicles by municipal, federal or state authorities by reason of the violation of any municipal, federal or state law.

The appellees herein, in their bill of complaint, (R. 8), contend that the enforcement and execution of said Department Bulletin No. 25 (R. 24) would impair each and all of said conditional sale contracts, injuriously affect the standing and reliability of said appellees as surety companies, and entirely destroy the general business of each and the good will thereof in the state of Oregon, thereby causing inestimable and irreparable damage and injury to the said appellees and each of them, and depriving them of their property without due process of law in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States.

A motion was interposed by appellant to dismiss the plaintiffs' bill of complaint herein (R. 10), on the ground that the same failed to state facts sufficient to constitute

a cause of suit or to entitle the plaintiffs to the relief prayed for in said bill of complaint, which motion was overruled by the court (R. 10), and appellees answered (R. 14).

After the motion of plaintiffs to strike parts of the answer (R. 19) had been sustained, and defendant refusing to plead further, a final decree (R. 22) was entered as follows:

"That the defendant, Will Moore, as Insurance Commissioner of the State of Oregon, or under color of his office, and his deputies and subordinates, be, and they are enjoined and restrained, so long as plaintiffs shall remain qualified to issue said confiscation coverage under the laws of the State of Oregon:

"(a) From cancelling the existing licenses and authorizations, or any of either, granted the plaintiffs, as in the bill of complaint set forth, permitting the underwriting of said confiscation coverage, within the state of Oregon;

"(b) From withdrawing the approval of the defendant's predecessor as Insurance Commissioner, of plaintiff's confiscation coverage;

"(c) From disapproving said confiscation coverage or refusing permission to the plaintiffs or either or any of them, to issue the same;

"(d) From cancelling or annulling, or attempting to cancel or annul, the authority or license of plaintiffs, or either or any of them, heretofore granted, to transact a surety and indemnity business within the state of Oregon, and particularly restraining and enjoining the defendant, his said deputies and subordinates, from cancelling or annulling or attempting to cancel or annul, the authority of plaintiffs, or either or any of them, to underwrite and issue insurance and indemnity contracts against all direct pecuniary loss which the insured may sustain, caused by the confiscation by municipal, federal or state authorities, of any automobile or automobiles covered by such insurance policy or cover-

age, by reason of the violation (otherwise than by the insured, or with the permission of the insured) of the provisions of any municipal, federal or state law;

“(e) From in any manner interfering with or obstructing the transacting of said business by said plaintiffs, or either or any of them, or by their agents, within said state, or the underwriting of said confiscation coverage within said state, so long as said plaintiff, or plaintiffs shall remain qualified under the laws of said state, to transact said business therein, and that said confiscation coverage be, and the same hereby is, decreed to be lawful surety insurance within the said state, and that the plaintiffs be, and they and each of them are authorized to continue underwriting and issuing the same.

“R. S. BEAN, Judge.”

The matter is brought to this court by a direct appeal from said final decree under the authority of the Act of Congress of February 13, 1925, (43 Stat., c. 229, p. 938), which amended section 266 of the Judicial Code (Act of March 4, 1913, 37 Stat., p. 1013, c. 160), which permits a direct appeal to the Supreme Court of the United States from a final judgment or decree of a District Court in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges.

The following cases are relied upon by appellant as sustaining the jurisdiction of the United States Supreme Court:

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 292, 67 L. Ed. 659, 43 S. Ct. 353;

Bluefield Water Works & Improvement Co. v. Public Service Co. of the State of West Virginia, 262 U. S. 679, 683, 67 L. Ed. 1176, 1179, 43 S. Ct. 675, 676;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7, 12, 12 Ann. Cas. 757;

Live Oaks Water Users' Association, et al. v. Railroad Commission of the State of California, 70 L. Ed. (Advance Opinions No. 7), 167, 168, 46 S. Ct. (Advance Opinions No. 6), 149;

Notley v. Brown, 208 U. S. 429, 52 L. Ed. 559, 28 S. Ct. 385;

Del Pozo et al. v. Wilson Cypress Co., 46 S. Ct. (Advance Opinions No. 4), 57, 58, 269 U. S. 82, 70 L. Ed. (Advance Opinions No. 3) 72, 74.

In re Buder, 46 S. Ct. (Advance Opinions No. 17), 557, 558, 70 L. Ed. (Advance Opinions No. 16), 634, 635, 636.

Statement of the Case

This is a direct appeal from a final decree of the District Court of the United States for the district of Oregon, dated May 18, 1925, (R. 22).

On March 26, 1924, the appellees herein filed in the District Court of the United States for the district of Oregon a bill of complaint (R. 1) in which they alleged that a certain order of the Department of Insurance, an administrative board or commission of the state of Oregon, which order is known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," (R. 24), is unconstitutional and deprives appellees of their property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States. Said appellees prayed in said complaint *inter alia* for an interlocutory injunction until the hearing of said cause and permanent thereafter, enjoining and restraining appellant herein from enforcing said order. The said order of the Department of Insurance of the State of Oregon cancelled and annulled the authorization and license previously issued to the appellees herein by appellant's predecessor in office, permitting said appellees to underwrite contracts of insurance commonly designated as confiscation bond or coverage on auto-vehicles sold on conditional sale contract (R. 2), retaining the title in the vendor. Such contracts of insurance indemnify the vendor against loss caused by confiscation of such auto-vehicles by municipal, federal or state authorities by reason of the violation of any municipal, federal or state law.

For authority to issue and enforce said order the Insurance Commissioner relies upon the statutes of Oregon.

Section 6323, Oregon Laws, authorizes the Insurance Commissioner to have and exercise the power to enforce all the laws of the state of Oregon relating to insurance and to issue such departmental rules, instructions and orders as he may deem necessary to secure the enforcement of such laws.

The insurance code of Oregon (sections 6322 to 6604, Oregon Laws, and acts amendatory thereof) contains specific provisions relating to the admission of certain classes of foreign insurance corporations to do insurance business of certain specified kinds within the state of Oregon.

A foreign insurance corporation doing business within the state of Oregon can legally transact only such business as the laws of Oregon authorize. All forms of insurance contracts must first be approved by the Insurance Commissioner of Oregon. (§ 6328, Oregon Laws, as amended by subd. 7, § 1, c. 155, General Laws of Oregon, 1921.)

It is the contention of appellant that the policy of confiscation coverage issued by appellees, the form of which policy is set out in full in plaintiffs' bill of complaint herein (R. 2), is void both as against public policy and because it is not permitted under any statute of the state of Oregon.

A final decree was entered in said suit on May 18, 1925, granting the relief prayed for in plaintiffs' bill of complaint and holding said confiscation coverage to be lawful surety insurance within the state of Oregon, from which decree the defendant Insurance Commissioner of the State of Oregon has appealed direct to this court, under the provisions of the Act of Congress, February 13, 1925, (43 Stat. c. 229, p. 938), which amended section 266 of the Judicial Code (Act of March 4, 1913, 37 Stat. p. 1013, c. 160).

The decision of the district court that the insurance in question is valid surety insurance is necessarily based upon the conclusion that such insurance is not contrary to public policy nor the state law, and, therefore, that a denial by the appellant of permission to underwrite the same deprives appellees of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Assignments of Error (R. 24)

The appellant assigns for error:

I

That the court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from cancelling the existing licenses and authorizations, or any of either, granted the plaintiffs as in the bill of complaint set forth, permitting the underwriting of said confiscation coverage, within the state of Oregon.

II

That the court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from enforcing that certain order of said Insurance Commissioner, made under and by virtue of the statutes of the state of Oregon, complained of in paragraph ninth of plaintiffs' complaint, withdrawing the approval of the former Insurance Commissioner of plaintiffs' confiscation coverage, which order is known as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," (R. 24), and reads as follows:

"Department Bulletin No. 25.

"Department Bulletin No. 14, dated April 21, 1921, regarding the use of Confiscation Clause in Oregon, and Department Bulletin No. 17, dated May 25, 1921, regarding Confiscation Coverage, are hereby cancelled and approval of confiscation clause heretofore permitted by these bulletins is withdrawn.

"This bulletin is issued in accordance with opinion by the Attorney-General of Oregon, regarding the use of confiscation clause in this state. The opinion reads in part as follows:

" '13 Corpus Juris, page 445, Sec. 383—Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.

* * * *

" 'In my opinion, therefore, such business falls within the definition above quoted, and is void as against public policy and can not be authorized by the Insurance Commissioner.'

"(Signed) WILL MOORE, Insurance Commissioner.

"November 20, 1923."

III

The court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from disapproving said confiscation coverage or refusing permission to the plaintiffs, or either or any of them, to issue the same.

IV

The court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from cancelling or annulling, or attempting to cancel or annul, the authority or license

of plaintiffs, or either or any of them, to transact a surety and indemnity business within the state of Oregon, and particularly from cancelling or annulling, or attempting to cancel or annul, the authority of plaintiffs, or either or any of them, to underwrite and issue insurance and indemnity contracts against all direct pecuniary loss which the insured may sustain, caused by the confiscation by municipal, federal or state authorities, of any automobile or automobiles covered by such insurance policy, or coverage, by reason of the violation (otherwise than by the insured or with the permission of the insured), of the provisions of any municipal, federal or state law.

V

The court erred in decreeing that the defendant, as Insurance Commissioner, his deputies and subordinates, be enjoined and restrained from in any manner interfering with or obstructing the transacting of said business by said plaintiffs or either or any of them, or by their agents, within said state, or the underwriting of said confiscation coverage within said state.

VI

That the court erred in holding and decreeing that said confiscation coverage is lawful surety insurance within the state of Oregon and in authorizing said plaintiffs and each of them to continue underwriting and issuing the same.

VII

The court erred in sustaining plaintiffs' motion to strike out parts of defendant's answer to the bill of complaint herein.

Explanatory Note

In order to place before the court what may be termed the atmosphere of this case, that is, the surrounding facts and conditions which furnish the setting of the legal question presented for decision by this appeal, we would respectfully show that it represents a most vital and important interest of the state of Oregon, namely, the enforcement of its laws and the laws of the United States within its borders, and indirectly furnishes a material assistance to the United States government in enforcing its laws throughout its jurisdiction. If the indemnity contracts against loss on account of confiscation of motor vehicles for violation of the law, involved in this proceeding, are valid, then a very serious hindrance to the enforcement of the prohibitory liquor laws is erected. Such confiscation indemnity contracts, if held legal, would make it possible for an illicit importer or distiller of intoxicating liquor to secure such number of motor vehicles as desired and furnish them to distributors on conditional sale contracts to be used in the sale and distribution of such intoxicating liquor, and for such importer or distiller to be entirely protected by means of such confiscation indemnity from any loss in case of the confiscation of any of such motor vehicles for use in such unlawful traffic. It would be next to impossible, or at least very difficult, to prove that the vendor of such vehicles, that is, the importer or distiller, had any knowledge of the illegal use to be made of such vehicles by the vendees, in the absence of direct proof of such conspiracy. Even where no such conspiracy exists, the incautious sale of motor vehicles upon conditional sales contracts to any and all persons without adequate investigation as to their reliability and the probable use to be made of such vehicles, and the vendors' interest in such

vehicles represented by the unpaid balances of the purchase price, being fully protected and indemnified by insurance contracts, such as those here involved, would tend to the same result. It is, therefore, in the interest of organized and unorganized violation of the prohibition laws to have such contracts declared legal insurance, thus assisting in breaking down the enforcement of such laws.

At this time, when strenuous efforts are being made to nullify and secure the repeal of the Eighteenth Amendment to the United States Constitution and the laws carrying the same into effect, public policy demands that contracts of the nature of those here in question shall not be permitted because they are a material assistance and protection of the lawless element which is striking at the very heart of our civilization, which is the obedience to, and enforcement of, our laws. This is not an insignificant or paltry notion of a sparsely settled community on the far away shores of the western sea, but an important and vital interest of the people of the whole United States. Thus the state of Oregon, though fighting alone, is representing and fighting for the welfare of the entire people and the permanence of their institutions.

For these reasons it is hoped that the court may not consider the cause of appellant as light or trivial in any respect, but as substantial, basic and fundamental.

Points and Authorities

I

JURISDICTION

(a) A direct appeal to the Supreme Court of the United States from a final decree of a district court is authorized in any suit in which the hearing on an application for an interlocutory injunction is required to be before three judges; that is, in any case in which such suit and application are brought for the purpose of suspending or restraining the enforcement or execution of an order made by an administrative board or commission created by and acting under and pursuant to the statutes of a state, upon the ground of the unconstitutionality of such order.

43 Stat. c. 229, p. 938. (§ 266, Judicial Code) ;

37 Stat. p. 1013, c. 160 (as amended by Act of Congress, February 13, 1925, 43 Stat. c. 229, p. 938) ;

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 292, 67 L. Ed. 659, 43 S. Ct. 353;

Bluefield Water Works & Improvement Co. v. Public Service Co. of the State of West Virginia, 262 U. S. 679, 683, 67 L. Ed. 1176, 1179, 43 S. Ct. 675, 676;

Live Oaks Water Users' Association et al. v. Railroad Commission of the State of California, 46 S. Ct. (Advance Opinions No. 6), 149, 70 L. Ed. (Advance Opinions No. 7), 167, 168;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7, 12, 12 Ann. Cas. 757;

Notley v. Brown, 208 U. S. 429, 52 L. Ed. 559, 28 S. Ct. 385;

Del Pozo et al. v. Wilson Cypress Co., 46 S. Ct. (Advance Opinions No. 4), 57, 58, 269 U. S. 82, 70 L. Ed. (Advance Opinions No. 3) 72, 74;

In re Buder, 46 S. Ct. (Advance Opinions No. 17), 557, 558, 70 L. Ed. (Advance Opinions No. 16) 634, 635, 636.

(b) The order of the Insurance Commissioner is an order made by an administrative board created by, under and acting under the statutes of the state of Oregon.

§ 6324, Oregon Laws, as amended by c. 329, General Laws of Oregon, 1921;

§ 6326, Oregon Laws;

§ 6328, Oregon Laws, as amended by c. 155, General Laws of Oregon, 1921.

II

ON THE MERITS

The contracts of insurance involved in this case are contrary to public policy as declared by the laws of the United States and of the State of Oregon, and are, therefore, void.

Eighteenth Amendment, Constitution United States;

§ 26, 41 Stat, 305, 315;

§ 3450 R. S., (§ 6352 U. S. Comp. Stat.);

42 Stat. 223, § 5, (§ 10138 4/5 c., U. S. Comp. Stat., Ann. Suppl. 1925);

§ 36, Article I, Constitution of Oregon;

§§ 2224 to 2224-67, both inclusive, Oregon Laws;

§§ 11 and 12, c. 29, General Laws of Oregon, 1923;

§ 17, 31 C. J. p. 425;

Gordon v. Gordon, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576, 578;

People v. Herrin, 284 Ill. 368, 120 N. E. 274, 276;

Greenhood on Public Policy, p. 2;

Cooper v. N. P. Ry. Co., 212 Fed. 533, 534, 536;

Midland Motor Co. v. Norwich Union Fire Insurance Society, Ltd., et al., 72 Mont. 583, 234 Pac. 482, 484;

Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Insurance Society, Ltd., and Fidelity & Deposit Company of Maryland, 72 Mont. 69, 232 Pac. 198, 36 A. L. R. 1495;

Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393;

6 R. C. L. p. 757, § 165;

31 C. J. p. 425, § 17.

III

Such insurance contracts are contracts of indemnity and not of suretyship or guaranty.

12 R. C. L. p. 1058, § 7;

31 C. J. p. 419, § 1;

28 C. J. p. 886, § 1; p. 890, §§ 4 and 5;

12 R. C. L. p. 1057, § 6.

IV

1. Appellees are not authorized to enter into such contracts of indemnity insurance either

(a) Under their authority pleaded in their complaint herein,

Paragraphs Second and Third, Plaintiffs' Bill of Complaint, (R. 1).

or

(b) By the laws of the State of Oregon relating to insurance.

§ 6322 O. L.;

§ 6337 O. L.;

§ 6343 O. L.

2. Such contracts are, therefore, ultra vires and void. 32 C. J. p. 989, § 21.

V

The action of the Insurance Commissioner, the appellant herein, in issuing said Department Bulletin No. 25 and in enforcing the same, is not contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States because appellees have no right to make such contracts.

12 C. J. p. 1200, § 966;

German Alliance Insurance Co. v. Barnes, 189 Fed. 769, 775, 778, 779;

Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 186, 31 S. Ct. 164, 165, 55 L. Ed. 167;

§ 6343, Oregon Laws.

Argument

We will endeavor to present the facts fully in the following pages with reference to the jurisdiction of this court because we are uncertain whether that question is still before the court or was disposed of upon the order to show cause why the same should not be dismissed, heretofore issued in this case, and in response to which a brief was filed by appellant setting forth his claim to the right of a direct appeal to this court. As we would understand, the action of the court in setting down the case for hearing, and not dismissing it, settles the question of the jurisdiction, but lest it be considered as still under consideration we have attempted to set forth such authorities as are deemed applicable, together with the jurisdictional facts and the statement of our understanding of their application.

I

AS TO JURISDICTION

(a) A direct appeal to this court from the final decree of a district court is authorized by Act of Congress of February 13, 1925, (43 Stat. c. 229, p. 938) which amends section 266 of the Judicial Code (37 Stat. p. 1013, c. 160), in any suit in which the hearing on an application for an interlocutory injunction is required to be before three judges, which suit and application are brought for the purpose of suspending and restraining the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of a state upon the ground of the unconstitutionality of such order.

It appears from the bill of complaint in the instant case that this suit was brought for the purpose of restraining the appellant herein, as head of the Department of Insurance of the State of Oregon, from enforcing that

certain order of the Department of Insurance known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," set out in full at page 24, Transcript of Record.

The said Act of February 13, 1925, 43 Stat., c. 229, page 938 (amending § 238 of the Judicial Code), providing for a direct review by the Supreme Court from a final decree granting a permanent injunction in a suit restraining the enforcement of an order made by an administrative board or commission created by and acting under the statute of a state, reads in part as follows:

"A direct review by the supreme court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following acts or parts of acts, and not otherwise:

* * * *

"(3) An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state, approved March 4, 1913, which act is hereby amended by adding at the end thereof "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit."

Section 266 of the Judicial Code, (Act of March 4, 1913, 37 Stat., page 1013, chapter 160, as amended by the Act of February 13, 1925, 43 Stat., page 938, chapter 229,) now reads as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or exe-

cution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the supreme court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; provided, however, that one of such three judges shall be a justice of the supreme court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the state, and to such other persons as may be defendants in the suit; provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory

injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the supreme court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

* * * *

"The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit."

In the case at bar, the said Department Bulletin No. 25, is directly attacked in plaintiffs' bill of complaint herein (R. 7 and 8), as being unconstitutional. In paragraph ninth of said bill of complaint, it is alleged:

"Ninth. That on or about the 20th day of November, 1923, said defendant wrongfully and unlawfully, and in excess of the powers conferred upon the Insurance Commissioner of the State of Oregon, by the laws and statutes thereof, and pretending to act as such Insurance Commissioner while so doing, delivered to each of the plaintiffs herein a so-called "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," signed by said defendant, by which said defendant attempted to cancel and annul the said authorization and license to underwrite said confiscation coverage, previously granted to each of said plaintiffs by defendant's predecessor and recognized by defendant himself as such Insurance Commissioner, for the entire period of his incumbency of said office prior to the date of said notice, and by which said alleged 'Bulletin No. 25,' said defendant

also attempted to withdraw the approval of his said predecessor in office and of himself as such officer, of the said confiscation bond and the underwriting thereof, all on the alleged ground and pretended claim of said defendant that said confiscation coverage shows upon its face that it is a contract calculated to impede the regular administration of justice, in that it serves to encourage the transportation of intoxicating liquors by auto-vehicle in violation of the laws of the United States and of the State of Oregon, and is, therefore, void as against public policy, and upon the protest of these plaintiffs that the said confiscation bond is not illegal, as aforesaid, but is a valid contract of insurance authorized by the laws and statutes of said state of Oregon, and that they are entitled to underwrite same, the said defendant has informed plaintiffs and each of them, and now threatens that unless they and each of them shall forthwith and entirely refrain from underwriting said confiscation coverage within the state of Oregon, defendant, as such Insurance Commissioner, will cancel and annul the licenses of plaintiffs to transact any and all surety business whatsoever within said state, thereby preventing these plaintiffs from enjoying any of the corporate privileges for which at all times herein mentioned they have been and still are duly qualified under the laws of said state.

"That the said action of the said defendant is arbitrary, capricious and unauthorized by any statutory regulation of said state, is a mere assumption of nonexistent authority, and will jeopardize all of plaintiffs' said Confiscation Bonds, the business of underwriting same and the avails thereof, will impair each and all of said conditional sale contracts, injuriously affect the standing and reliability of plaintiffs as surety companies, entirely destroy the general business of each and good will thereof, in said state, thereby causing inestimable

and irreparable damage and injury to said plaintiffs and each of them and depriving plaintiffs of their property without due process of law, in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States."

(1) Application of the statute to departmental orders.

Section 266, Judicial Code, in its application to cases involving orders of state administrative boards, is not confined by the amendment of March 4, 1913, to those cases in which the constitutionality of a statute is challenged, but applies also to where the order is attacked as in itself unconstitutional.

In the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292, 67 L. Ed. 659, 43 S. Ct. 353, the court said:

"A doubt has been suggested whether these cases are within section 266 of the Judicial Code, Act of March 3, 1911, chapter 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, chapter 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute,' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601, 604; *Phoenix Ry. Co. v. Geary*, 239 U. S. 277, 280,

281; *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U. S. 212; *Western & Atlantic R. R. v. Railroad Commission of Georgia*, ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. *Louisville & Nashville R. R. Co. v. Garret*, 231 U. S. 298, 301, 318; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 555; *Grand Trunk Western Ry Co. v. Railroad Commission of Indiana*, 221, U. S. 400, 403. But it plainly was intended to enlarge, not to restrict the law. We mention the matter simply to put doubts to rest."

In the case of *Bluefield Water Works & Improvement Co. v. Public Service Co. of the State of West Virginia*, 262 U. S. 683, 67 L. Ed. 1179, 43 S. Ct. 675, 676, the court said:

"* * * The petition alleges that the order is repugnant to the Fourteenth Amendment, and deprives the company of its property without just compensation and without due process of law, and denies it equal protection of the laws. A final judgment was entered, denying the company relief and dismissing its petition. The case is here on writ of error.

"1. The city moves to dismiss the writ of error for the reason, as it asserts, that there was not drawn in question the validity of a statute or an authority exercised under the state, on the ground of repugnancy to the federal Constitution.

"The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the state. The

prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. * * *

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7, 12, 12 Ann. Cas. 757.

In the case of *Live Oak Water Users' Association et al. v. Railroad Commission of the State of California*, (No. 7, decided Jan. 4, 1926,) Advance Opinions, 70 L. Ed. 167, 168, 46 S. Ct. (Advance Opinions No. 6), 149, 150, the court held that for the purposes of jurisdiction of the Supreme Court of the United States an order of a public service commission fixing rates for service by public utility must be treated as though an act of the legislature.

The court further held that it had no jurisdiction of an appeal unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute or an authority exercised under the state because of repugnance to the Constitution of the United States.

(2) Application of the statute to cases heard but not decided when it took effect.

The said Act of February 13, 1925, (43 Stat. c. 229, p. 938, 942, became effective May 13, 1925. The final decree in this suit was entered May 18, 1925. Thus in the case at bar no decree had been entered and no right of appeal had accrued at the time the Act of 1925 became effective. Therefore, from the fact that the decree was entered after the new law went into effect, the right of appeal accrued under and is granted and regulated by the amended statute. This is particularly true since the Act by its very terms specially provides:

"Section 14. That this act shall take effect three months after its approval; but it shall not affect cases

then pending in the supreme court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

By the rule of elimination declared in the statute, it must apply to all cases in which the judgment or decree appealed from was entered subsequent to its taking effect.

It is well settled that the right of appeal or other review in an appellate court is governed by the provisions of the law applicable thereto in force at the time when the judgment is rendered.

Notley v. Brown, 208 U. S. 429, 52 L. Ed. 559, 28 S. Ct. 385.

The provisions of the statute granting the right to an appeal is purely a matter of remedy in connection with procedure, and, as such, applies to pending cases from the effective date of the act. This is clearly the provision of the act itself, contained in section 14 above quoted. Therefore, from the fact that the decree was entered after the new law became effective, the right of appeal accrued under and is granted and regulated by the amended statute.

In the recent case of *Del Pozo et al. v. Wilson Cypress Co.*, 269 U. S. 82, 70 L. Ed. (Advance Opinions No. 3) 72, 74, 46 S. Ct. (Advance Opinions No. 4) 57, 58, this court said:

"The motion to dismiss must be denied. The appeal was taken under sections 128 and 241 of the Judicial Code (Comp. Stat. §§ 1120, 1218), as existing when the decree of affirmance by the circuit court of appeals was entered, and is not affected by the subsequent act of February 13, 1925, chapter 229, 43 Stat. 936."

(3) The right of direct appeal applies to all suits drawing in question the validity of state legislative action as in conflict with the United States Constitution; and unquestionably so when, as in this case, an interlocutory injunction is prayed for in the complaint.

The right of direct appeal to the United States Supreme Court is given as to the suit itself without regard to the issuance or denial of an interlocutory injunction. No suit can be commenced in good faith merely to obtain an interlocutory injunction, hence the language of the statute under consideration herein relating to an appeal of "such suits" can not refer to other than *all suits* brought to restrain the enforcement of state statutes and orders made by administrative boards or commissions acting under and pursuant to state statutes in which the hearing on an application for an interlocutory injunction is required to be before three judges, that is, upon the ground of their unconstitutionality, also in which the final hearing is required to be before three judges upon the same ground. The suits to which section 266 of the Judicial Code, as amended by the Act of 1925 (Comp. Stat. Supp. § 1243), apply, are discussed in the case of *In re Buder*, 46 S. Ct. (Advance Opinions No. 17) 557, 558, 70 L. Ed. (Advance Opinions No. 16) 634, 635, 636, in which the court said:

(p. 557) "An interlocutory injunction had not been prayed for in the bill, or otherwise sought. * * *

(p. 558) "The suits to which section 266 (Judicial Code) relates are those in which the relief sought is an 'interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by

an administrative board or commission acting under and pursuant to the statutes of such state * * * upon the ground of the unconstitutionality of such statute.' In any such suit the application for an interlocutory injunction was required to be heard before three judges, and from their decree a direct appeal lay to this court; but, prior to the Act of February 13, 1925, a final hearing in the suit was had before a single judge. Compare *Patterson v. Mobile Gas Co.*, 269 U. S. —, 46 S. Ct. 445, 70 L. Ed. —, No. 225, decided April 26, 1926. From his decree a direct appeal to this court could be founded only upon the provisions of section 238 as originally enacted. *Shaffer v. Carter*, 252 U. S. 37, 44, 40 S. Ct. 221, 64 L. Ed. 445. Where the jurisdiction of the district court was invoked upon other federal grounds, as well as the one attacking the constitutionality of the state statute, an appeal might be taken to the circuit court of appeals, with ultimate review in this court if the case was of the class within its jurisdiction. *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 53, 42 S. Ct. 244, 66 L. Ed. 458. To remove the existing anomaly, and to prevent that which would otherwise have resulted from the repealing provisions of the Act of February 13, 1925, that act further amended section 266, as amended by Act of March 4, 1913, c. 160, 37 Stat. 1013, being Comp. St. § 1243, by adding at the end thereof:

"The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the supreme court may be taken from a final decree granting or denying a permanent injunction in such suit.' Comp. Stat. Supp. 1925, § 1243.

"As so amended, section 266 also permits a direct appeal to this court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges."

All of the elements constituting the right of a direct appeal from the district court to this court are found in the instant case. The bill of complaint (R. 8) prays for an interlocutory injunction, and in paragraph 9, *supra* (R. 7 and 8), bases plaintiffs' right to an injunction upon the allegation that the issuance of said departmental bulletin and its enforcement by the appellant would cause "inestimable and irreparable damage and injury to said plaintiffs, and each of them, and deprive plaintiffs of their property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States." It is, therefore, a suit which required the hearing on the application for an interlocutory injunction to be before three judges, as stated in the last paragraph above quoted from the case of *In re Buder*, as constituting the class of cases in which a direct appeal is now authorized.

Appellant herein maintains that the court erred in decreeing that the defendant, as Insurance Commissioner, is enjoined and restrained from in any manner interfering with or obstructing the transacting of the business of underwriting said contracts of confiscation coverage, and in holding and decreeing said confiscation coverage to be lawful surety insurance within the state of Oregon, and in authorizing said plaintiffs (appellees herein) and each of them to continue underwriting and issuing the same.

In order to reach such conclusion, the court necessarily had to pass upon the constitutionality of said order, Department Bulletin No. 25 (R. 24). If the insurance is lawful and valid surety insurance as held by the court, and the appellant had no authority to issue or enforce the order in question, as also held by the court, the action of the appellant, which was enjoined by the final decree, was in contravention of the Fourteenth Amendment, as alleged

in the complaint. The suit is, therefore, in all respects, squarely within the provisions of section 266 of the Judicial Code, as amended.

(b) The order of appellant known and designated as "Department Bulletin No. 25 of the Department of Insurance of the State of Oregon," enforcement of which this suit was brought to enjoin, upon the ground of its unconstitutionality, is an order made by an administrative board or commission created by and acting under the statutes of the state of Oregon.

Section 6324, Oregon Laws, as amended by chapter 329, General Laws of Oregon, 1921, reads as follows:

"There shall be in this state a department charged with the execution of the laws relating to insurance, to be called the 'Department of Insurance of the State of Oregon.' At the head of such department there shall be a State Insurance Commissioner. He shall be appointed by the Governor * * *."

At all times since March 1, 1923, Will Moore, the defendant herein, has been and still is the duly appointed, qualified and acting Insurance Commissioner of the State of Oregon. (Bill of Complaint, paragraph 4, R. 2).

Section 6326, Oregon Laws, reads, in part as follows:

"GENERAL POWERS AND DUTIES OF COMMISSIONER.

(1) *Enforce Insurance Laws and Make Rulings.* The Insurance Commissioner shall have and exercise the power to enforce all the laws of the state relating to insurance, and it shall be his duty to enforce all the provisions of such laws for the public good. He shall issue such department rulings, instructions and orders as he may deem necessary to secure the enforcement of the

provisions of this act, but nothing contained in this act shall be construed to prevent any company or persons affected by any order or action of the Insurance Commissioner from testing the validity of same in any court of competent jurisdiction.

"(2) *To Issue Certificates and Licenses.* He shall issue all certificates and licenses under the seal of his office provided for by the terms of this act. Before granting certificates of authority to any insurance company to issue policies or make contracts of insurance in this state, the commissioner shall be satisfied by such examination as he may make, or such evidence as he may require, that such company is duly qualified under the laws of this state to transact business herein."

Section 6328, Oregon Laws, as amended by chapter 155, General Laws of Oregon, 1921, provides:

"1. A foreign or alien insurance company may be authorized or licensed to do business in this state when it shall have complied with the following requirements:

* * * * *

"7. Every such insurance company or other insurer, excepting a marine insurance company, before it shall receive a license or a renewal of its license to transact the business of making insurance as an insurer in this state, shall file in the office of the Insurance Commissioner its rating schedules and policy forms to be used in the transaction of its business in this state."

The acts of said commissioner are not reviewable by any officer or administrative board of the state of Oregon, and the said Insurance Commissioner is, in fact, the department of insurance; therefore, the acts of said Insurance Commissioner are, in fact, the acts of the Department of Insurance of the state of Oregon.

Section 6324, Oregon Laws, as amended by Chapter 329, General Laws of Oregon, 1921.

Section 6326, Oregon Laws.

(Both above quoted.)

Said bulletin was issued by appellant under the authority granted him by a state statute, and forbids an act against public policy, which had been declared by the constitution and statutes of the United States and of the State of Oregon, as well as ultra vires under the provisions of the state law relating to insurance, both of which we will discuss under their appropriate heads. Such order was issued in the discharge of the duty imposed upon him by section 6326, Oregon Laws, hereinbefore quoted, "to enforce all the provisions of such (insurance) laws for the public good." He had a right to be guided as to what is for the public good by the Constitution and laws of the United States and the State of Oregon. Really, he could have no better authority.

II

ON THE MERITS

The insurance contracts in question are void as against public policy.

The Eighteenth Amendment to the Constitution of the United States, which binds all individuals, public officers, courts and legislative bodies, provides:

"Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

* * * * *

The National Prohibition Act (41 Stat. 305), popularly known as "The Volstead Act," and acts amendatory thereof, is an act to prohibit the manufacture, sale, transportation and possession of intoxicating liquors for beverage purposes. Section 26 (p. 315) of said act reads as follows:

"Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors, in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the

cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *

42 Stat. p. 223, c. 134, § 5, (§10138 4/5c, U. S. Comp. Stat. Ann. Supp. 1925) provides:

"All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35, of Title II of the National Prohibition Act, shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor. (Nov. 23, 1921)
* * *."

§ 3450 R. S. (§ 6352 U. S. Comp. Stat. Compact Ed., 1918) provides, among other things, for the confiscation of vehicles used in violation of law.

An amendment to the Constitution of the State of Oregon was proposed by initiative petition filed July 1, 1914, and was adopted by the vote of the people on November 3, 1914, which reads as follows:

(§ 36, Art. I, Constitution of Oregon, p. 94, Oregon Laws.)

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold within this state, except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the constitution and laws of this state and of the charters and ordinances of all cities, towns and other municipalities therein in conflict with the provisions of this section, are hereby repealed."

The Legislative Assembly of the State of Oregon, in 1915, enacted chapter 141, General Laws of Oregon, 1915, relating to intoxicating liquors, and prohibiting the manufacture and sale thereof within the state of Oregon. (Sections 2224 to 2224-67, both inclusive, Oregon Laws), which is still in effect.

Section 2224-4, Oregon Laws, provides:

"Except as hereinafter provided in this amendatory act it shall be unlawful for any person to receive, import, possess, transport, deliver, manufacture, sell, give away or barter any intoxicating liquor within this state; and the place of delivery of any intoxicating liquor is hereby declared the place of sale; provided, that it shall not be unlawful for any person to have in his possession intoxicating liquor lawfully procured and in the possession of such person within this state at the time of the taking effect of this amendatory act, or lawfully obtained or received under the provision of this act." (L. 1915, c. 141, § 5; L. 1917, c. 40, § 1.)

Said Legislative Assembly in 1923 enacted chapter 29, General Laws of Oregon, 1923, entitled:

"An act to provide for the forfeiture and sale of boats, vehicles and other conveyances used in the unlawful transportation or possession of intoxicating liquor within the state of Oregon, and for the proceedings in respect thereto, and for the disposal of the proceeds of sale of such forfeited property; making it a felony to place intoxicating liquor in any boat, vehicle or conveyance with intent to cause the same to be forfeited or confiscated, or the owner or person in charge to be made subject to prosecution; and declaring an emergency."

Sections 11 and 12 of said act provide:

"Section 11. Whenever, in proceedings under this act, intoxicating liquor is shown to have been found in or upon any boat, vehicle or other conveyance or in the possession of any person in or upon the same, or is proved to have been transported or kept therein, it shall be presumed that the same was done with the knowledge and consent of the owner and of the person in charge of or possession of such boat, vehicle or other conveyance and with the knowledge and consent of any holder of any lien thereon, but such presumption shall be a disputable one. If any person proceeded against or intervening for the protection of his interest in such proceedings shall establish to the satisfaction of the court, by a preponderance of the evidence, that he is and was at the time of the commission of the act or acts for which said boat, vehicle or other conveyance is subject to forfeiture, the actual and bona fide owner thereof, and that the said boat, vehicle or other conveyance had been taken and was being used by the person or persons in possession thereof at the time of the commission of said unlawful act or acts without his knowledge and consent, and that he had no notice or knowledge of such possession or of such unlawful use of the same, said boat, vehicle or other conveyance shall be

ordered by the court to be ordered by the court (sic) to be returned to such owner; and * * * if it be established to the satisfaction of the court, at the hearing, that any person has a bona fide lien on such boat, vehicle or other conveyance, that the said lien was created without the lienor having any notice or knowledge that such boat, vehicle or other conveyance was being used or was to be used for the illegal transportation of intoxicating liquor, and that such ignorance thereof had continued up to the time of said seizure, then said lien shall be ordered to be paid and discharged, so far the same shall suffice therefor, out of the proceeds of the sale of said property after payment of costs and expenses of the seizure, keeping and sale thereof, and of the proceedings and trial as herein provided for. All liens against property sold under the provisions of this act, established as herein provided, and adjudged to be paid therefrom, shall be transferred from the property to the proceeds of the sale.

"Section 12. When any property is sold under the provisions of this act the proceeds shall be applied as follows:

"1. To the payment of the costs of the forfeiture proceedings and actual expenses of seizing, keeping and preserving the property.

"2. To the payment of any liens adjudged to be paid. * * *

Public policy will not permit the enforcement of a contract which offers a temptation to violate the law or which undertakes to indemnify another against the consequences of an act which is illegal. 31 C. J. p. 425, § 17.

In the case of *Gordon v. Gordon*, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916D, 576, 578, the court discussed public policy as follows:

"There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common

law or by statute is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void.

"There are also many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that on grounds of public policy they can not be admitted as the subject of a valid contract.

"It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

"But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

"It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo & A. Valley R. Co. v. Taylor*, 6 Colo.1, 45 Am. Rep. 512; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

"The rule must not be understood to mean that in order that a contract may be declared to be against public policy it must be inimical to morality. Many contracts which are not immoral are nevertheless void on the ground that they are against public policy. *Kohn v. Milcher*, (C. C.) 10 L. R. A. 439, 43 Fed. 641.

"In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint of liberty and natural or legal right, or the obstruction of justice, or the violation of a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any known rule of law requires it."

People v. Herrin, 284 Ill. 368, 120 N. E. 274, 276.

Greenhood on Public Policy, page 2.

Cooper v. N. P. Ry. Co., 212 Fed. 533, 534, 536.

The question as to the validity of a policy of insurance indemnifying the conditional vendor of an automobile against confiscation thereof for the violation of any state, federal or municipal laws, by his conditional vendee, is a new one, and there appear to be but two reported decisions which touch upon this point.

The case of *Midland Motor Co. v. Norwich Union Fire Insurance Society, Ltd., et al.*, 72 Mont. 583, 234 Pac. 482, 484, involved a policy insuring the vendor of an automobile against its confiscation for violation of the intoxicating liquor law. The automobile in question was seized on January 4, 1921, while being used in transporting a load of whisky, and on January 8, 1921, was turned over to the federal authorities and thereafter confiscated and sold under an order of the United States District Court for the District of Montana.

The court said:

"The National Prohibition Act (41 Stat. 305 (U. S. Comp. St. Ann. Supp. 1923) § 10138 $\frac{1}{4}$ et seq.), became effective on October 28, 1919, and title 2, section 35 (§ 10138 $\frac{1}{2}$ v) thereof provides:

"'All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency.'

"In the cases of *U. S. v. One Haynes Automobile* (C. C. A.) 274 F. 926, *Lewis v. U. S.* (C. C. A.) 280 F. 5, *U. S. v. One Packard Truck*, (D. C.) 284 F. 394, and *McDowell v. U. S.* (C. C. A.) 286 F. 521, it was expressly declared that in so far as it provided for the confiscation and forfeiture of automobiles used in the illegal transportation of intoxicating liquors the provisions of section 3450 were repealed by the National Prohibition Act. To the same effect is the case of *U. S. v. Yuginovich*, 256 U. S. 450, 41 S. Ct. 551, 65 L. Ed. 1043.

"By the supplementary Prohibition Act of November 23, 1921, c. 134, § 5, 42 Stat. 223 (Comp. St. Ann. Supp. 1923, § 10138 4/5 c), the Congress reenacted 'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted.' See *U. S. v. Stafoff*, 260 U. S. 477, 43 S. Ct. 197, 67 L. Ed. 358.

"From this it follows that the automobile in question could not have been confiscated in January, 1921, under section 3450, since no authority for such a confiscation then existed under that section, and, therefore, upon the record before us, we must hold that the confiscation was under title 2, section 26, of the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138¹/₂mm).

"It is not questioned in this case but that it is competent and legal to insure the vendor of an automobile against the confiscation thereof for a violation of the National Prohibition Act by a person other than the vendor. Since this in effect is all that the policy and confiscation clause in question did, we must hold that the same are not void and unenforceable as against public policy.

"The question whether a policy of insurance against confiscation under the provisions of section 3450, as reenacted, would be void as against public policy, is not presented in this case and no opinion is expressed thereon."

It will be observed that the court expressly stated that the question of public policy under said § 3450 R. S., as reenacted, was not presented in this case.

The case of *Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Insurance Society, Ltd., and Fidelity & Deposit Co. of Maryland*, 72 Mont. 69, 232 P. 198, 36 A. L. R. 1495, involved the liability of the insurance company for loss caused by the confiscation of an automobile by Canadian officials, under a bond agreeing to indemnify the conditional vendor of an automobile sold on conditional sale contract, against direct pecuniary loss which the assured may sustain caused by the confiscation by municipal, federal or state authorities of such automobile by reason of the violation of the provisions of any municipal, federal or state law. The question of public policy did not arise in this case. The defendants attacked the sufficiency of the complaint and insisted that it disclosed upon its face that the seizure and confiscation of the automobile by Canadian officials within the Dominion of Canada, is not "confiscation by municipal, federal or state authorities" by reason of any "municipal, federal or state law," within the meaning of the language of the coverage bond. Defendants contended that these terms apply solely to officers and laws of the United States, and hence that the car was never insured against confiscation in Canada. The court said:

"We can not narrow the range of the insurer's obligation by giving to the terms 'municipal,' 'federal,' and 'state,' the technical and restricted construction for which the defendants contend, for under the facts disclosed by the record we think they apply with equal propriety to Canada. * * *

"The judgment is affirmed as to the defendant Fidelity & Deposit Company of Maryland. * * *"

The case of *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, 132 Pac. 393, is a case cited by courts and textbook writers in support of the contention that insurance against violation of law is valid. However, an examination of said case will reveal the fact that the insurance was not against a violation of law but was against another liability. The policy involved in said case, insured against loss or expense resulting from claims upon the assured for damages on account of bodily injuries or death accidentally suffered, while the policy was in force, by any person or persons, and caused by any of the taxicabs operated by the respondent. While the policy was in force an automobile driven by an employe of the Taxicab Company ran against an employe of the city of Spokane in the performance of his duties, and inflicted bruises and wounds upon him from which he died a few days later. An action was brought by the Taxicab Company against the insurance company upon the bond. As a defense the insurance company alleged that the policy was issued and accepted on the express understanding and agreement that in no event should the insurance company be liable thereon if the Taxicab Company, in operating its automobiles, permitted its employes to run them at a rate of speed exceeding the speed limit prescribed by the ordinances of the city of Spokane, and that the automobile operated by the taxicab employe which ran down and killed the employe of the city, was, at that time, being run at a rate of speed exceeding the speed limit provided by such ordinances.

The court held that the contract was not void simply because the accident happened while the taxicab driver was violating the law.

In other words, *it was in spite of and not because of the violation of the law* that damages were payable to the widow of the man who was killed by the taxicab driver.

The violation of the law was incidental and outside of the contract, *and was not the basis upon which the contract was founded.*

The several textbook writers, who cite this case, appear to have overlooked the distinction between a severable contract which may be held valid in spite of an incidental violation of the law and a contract, the basis of which, and the only circumstance under which payment can be made, depend upon a violation of the law.

Public policy demands that any contract which lends its aid to those who would violate the law, or makes the consequences of such violation less certain or drastic, shall not be permitted.

In 6 R. C. L. p. 757, § 165, it is said:

"It is an established general principle that contracts having for their subject-matter any interference with the due enforcement of the laws are against public policy, and are therefore void. The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration."

In 31 C. J., p. 425, § 17b, it is said:

"A contract or bond by which one party undertakes to indemnify the other against the consequences of an act which is illegal, because of its being contrary either to positive law or public policy, and which the parties either actually or constructively know to be so, is illegal and void."

Under the circumstances involved in the issuing of the insurance contracts under consideration, it is not seen how the district court could hold and decide that such contracts were not contrary to public policy, defined and discussed

in the foregoing quotations of authority. The willingness of the conditional vendor of a motor vehicle to sell the same and retain the title in himself upon a small partial payment being made, to anyone willing to make such payment, and also pay the premium upon an insurance policy covering the usual liabilities and also a policy or contract fully indemnifying such vendor against any loss of the remainder of the purchase price, by reason of the confiscation of such motor vehicle for violation of the law, not actually committed by him or under his authority or direction, and his action thereon together with the surety company can not be questioned or denied to be a great assistance to one engaged in the unlawful transportation of intoxicating liquors. If it were not possible for him to obtain a motor vehicle under such circumstances, in many cases he would not obtain it at all, or would hesitate longer in taking the chances which he does of being apprehended and having the motor vehicle which he might be operating confiscated. He would be much more careful and hence violate the law less brazenly and less often if it were necessary for him to purchase and pay for the motor vehicle which he uses in such transactions and thereby render himself liable to the full loss of the price of such vehicle.

It is the policy of the law, both federal and state, that persons engaged in the unlawful transportation of intoxicating liquor shall suffer, in addition to other penalties, that of the loss of all vehicles used by them in such transportation. The entrance of the insurance companies into the transaction makes it possible for one to engage in such criminal transactions without incurring such risk. It is by means of such confiscation coverage policies that one of the principal stings of the law is taken away. It is urged by appellees that the contracts under consideration are not made in contemplation of the violation of the law by or

under the direction or consent of the insured, that is, the conditional sales vendor. We may grant that it is true that they are not made under his immediate direction or control. He is at least entitled to his presumption of innocence to that extent; but if he did not know, and the surety company did not know that there is a liability that a part of the motor vehicles sold under conditional sales contracts will be confiscated for law violations, there would be no subject-matter upon which such insurance contracts could operate. If there were no risk recognized, there could be no insurance. These facts are axiomatic and require no proof.

It is noticed from the form of contract pleaded by appellees in their complaint (R. 2) that the insured therein is not required to and does not warrant any facts or circumstances with reference to the reliability, honesty or worthiness of confidence of the vendee of the motor vehicle covered by the confiscation insurance, but he only warrants that he has had no notice or knowledge thereof. (R. 4). He is not required to make any inquiry or investigation of such matter, as a prudent person would do if he were proceeding at his own risk, but under the contract the less he knows the better for him and for the business of the surety companies in making such coverage contracts. Such contract of indemnity puts a premium upon his ignorance and want of diligence in the respect which would otherwise be of major importance to him, with the result that the law would be more generally observed and less frequently violated. It is, therefore, clearly a winking at and an assistance in the violation of the law by both the conditional vendor in making such sale, on account of his being fully protected therein by the surety company, and on the part of the surety company in making such contract of indemnity. They are, therefore, both engaged, not in a

direct violation of the law but in furnishing the means and making it easier for a third party to do so, and hence are acting directly contrary to public policy, as hereinbefore defined, in entering into such contracts. It follows that appellees would not be denied any right of contract which they have under the constitution, or any other property, contrary to the Fourteenth Amendment of the Constitution of the United States, or at all, and that the order or bulletin of appellant withdrawing their authorization to make such contracts was not in contravention of the Constitution of the United States, as alleged by appellees and held by the district court.

III

The insurance contracts involved in this suit are properly classified as indemnity insurance, as distinguished from suretyship or guaranty insurance.

The following quotations defining "suretyship" and "guaranty on the one hand, and indemnity insurance on the other, make it entirely clear that the insurance here under consideration belongs to the class of indemnity insurance and not of suretyship or guaranty."

In 12 R. C. L., p. 1058, § 7, it is said:

"There is an important difference between a contract of *guaranty* and one of *indemnity*. The former is a *collateral* undertaking and presupposes some contract or transaction to which it is collateral, while the latter is essentially an *original* contract. If one indemnifies another from loss from the acts of a third party, though there is privity *between the parties to the indemnity*, there may be *no privity or obligation as between the parties to the indemnity and such third party*; but in the contract of *guaranty* it is essential that there be *two*

different contracts, and hence there is always privity of contract between the principal debtor and the creditor. An obligation may constitute both a guaranty and an indemnity. Thus, a building contractor's bond may contain a covenant to indemnify the obligee against loss from work performed and materials furnished for the building and may contain also a covenant whereby the obligor guarantees the performance of the work and the furnishing of materials." (Italics ours.)

In 31 C. J., p. 419, § 1, it is said:

"The word 'indemnity' means protection or exemption from loss or damage past or to come; it signifies to reimburse, to make good, and compensate for loss or injury, to make sure, to protect from injury, etc. Generally speaking, the word carries with it two meanings: (1) in the sense of giving security; and (2) in the sense of relieving a party from liability for damage already accrued; and in a broad and general sense indemnity is that which is given to a person to prevent his suffering damage. *But as relating to the contract of indemnity it may be more specifically defined as the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.*" (Italics ours.)

In 28 C. J., p. 886, § 1, it is said:

"The term 'guaranty' * * * is a collateral promise or undertaking by one person to answer for the payment of some debt or the performance of some contract or duty in case of the default of another person, who in the first instance is liable for such payment or performance; a collateral promise or undertaking to pay a debt owing by a third person in case the latter does not pay. It is an agreement by one person to answer to another for the debt, default or miscarriage of a third person; and in some jurisdictions this latter definition is given by statute. * * *

and at page 890, § 4, it is said:

"In a broad sense a contract of guaranty corresponds with that of suretyship, the distinction between them being merely technical, and a transaction which is called in some cases an absolute guaranty is denominated by other courts a contract of suretyship. A guaranty is like a suretyship in the sense that it is an engagement to answer for the debt, default or miscarriage of another, and for this reason the terms 'surety' and 'guarantor' or 'guaranty' are often confounded and used interchangeably. The two subjects, however, have some important distinguishing features, which are not easy to define by any brief and comprehensive formula.

"§ 5. Statements of distinctions. * * * The contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done, whereas a guarantor enters into a cumulative collateral engagement, by which he agrees that his principal is able to and will perform a contract which he has made or is about to make, and that if he defaults the guarantor will, upon being notified thereof, pay the resulting damages. *A surety is an insurer of the debt or obligation, while a guarantor is an insurer of the ability or solvency of the principal.* * * *" (Italics ours.)

In 12 R. C. L., p. 1057, § 6, it is said:

"Suretyship.—The distinction between the contract of guaranty and the contract of suretyship is not always clear. * * * The vital difference between the contract of a surety and that of a guarantor is that a surety is charged as an original promisor, while the engagement of a guarantor is a collateral undertaking. A surety is a party to the principal obligation, undertaking together with the principal debtor that it shall be performed, while the guarantor is not a party to the principal obligation. In case of suretyship there is but one contract binding the surety and the promisor, but in the case of a guaranty there are two contracts,

one binding the principal debtor and one binding the guarantor. * * * The agreement of the surety is that he will do the thing which the principal has undertaken: the agreement of the guarantor is that the principal will do what he is bound to perform. Another distinction is that a promise of a surety is supported by the consideration on which the promise of the principal is founded, and no other need be proved, while the engagement of a guarantor must be founded on some new or independent consideration, except in those cases where the guaranty is given at the time the debt is contracted by the principal, and so may be considered as connected with it. * * *

The liability against loss which the appellees assume under the contract pleaded in the complaint is stated therein (R. 3) as follows:

"Now therefore, in consideration of — dollars (\$—) premium, the Fidelity and Deposit Company of Maryland, hereinafter called this company, subject to all the terms and conditions stated in this obligation, agrees to indemnify the insured against all direct pecuniary loss which the insured may sustain caused by the confiscation by municipal, federal or state authorities of said automobile by reason of the violation (otherwise than by the insured or with the permission of the insured) of the provisions of any municipal, federal or state law.

"Subject to the following conditions:

"1. The liability hereunder shall in no case exceed the actual cash value of said automobile, at the time of such confiscation, nor two-thirds (2/3) of the purchase price thereof, nor the amount of the total unpaid instalments of the purchase price thereof payable by the vendee, exclusive of any interest thereon, less in each instance the amount realized by the insured from the proceeds of the sale of said automobile under the judg-

ment or order of confiscation; and the liability of this company hereunder shall be fully satisfied and discharged by the return of said automobile to the insured at the place of seizure or its recovery by, the insured. This company shall not be liable hereunder for any loss through physical damage to, or depreciation in value of, said automobile, nor for any loss through fire, theft, collision, or through any of the perils insured against under the above mentioned policy."

These provisions follow the recital (R. 2) in such contract that another policy of insurance has been issued upon the same motor vehicle covered by the confiscation indemnity contract now under consideration. Such other policy of insurance is referred to in the second of the two paragraphs above quoted, as covering "loss through fire, theft, collision, or through any of the perils insured against under the above mentioned policy." An examination of these provisions of the contract shows that it covers only loss that may be sustained by the insured conditional sales vendor on account of contingency which may arise, that is, confiscation of the vehicle, but which contingency, or confiscation, is not contracted for or engaged to be brought about by either of said parties or by a third party. This is a necessary and indispensable element of a surety or guaranty contract. Such requirement is discussed and clearly set forth by the authorities above quoted, defining and distinguishing these different kinds of insurance.

There is no undertaking on the part of the conditional vendee that he will not subject the motor vehicle involved in the transaction to confiscation; in fact, as already pointed out, the only provision upon this subject is as follows (R.) :

"5. It is warranted that the insured has had no notice or knowledge that the vendee is unreliable, dishonest or unworthy of confidence."

Appellant maintains that the said contract lacks every element necessary in a contract of guaranty or surety insurance, but on the other hand contains all of the elements of a contract of indemnity.

IV

Appellees are not authorized to enter into contracts of indemnity in the state of Oregon.

(a) The only kind of insurance which they have pleaded in their complaint that they are authorized to contract for in the state of Oregon is that of (R. 1) "guaranteeing the fidelity of persons in places of trust, the performance of contracts and bonds and undertakings, including the signing thereof as surety, as defined by section 6377, Lord's Oregon Laws, (Insurance Code aforesaid.)"

Incidentally it is here noticed that section 6377, *Lord's Oregon Laws*, which is the official publication of the laws of Oregon preceding that entitled "Oregon Laws," relates to "Obstructing Highway and Driving Stock—Penalty," and was repealed by chapter 334, General Laws of Oregon, 1917, while section 6377, Oregon Laws, which is the current publication, relates to the payment of dividends to its stockholders by domestic insurance companies. Hence the reference in the complaint above quoted to section 6377, "Lord's Oregon Laws," adds nothing to the preceding allegation.

It is further alleged in paragraph 3 of the complaint (R. 1) that each of the surety companies, appellees herein, " * * * satisfied the said Insurance Commissioner that it was a surety company * * * fully and legally organized and authorized under its charter, and laws of the state

of its origin, to become surety upon contracts, bonds, undertakings, obligations, recognizances and guaranties; * * * it made written application to said commissioner for authority to transact its said business in said state; * * * it paid to such commissioner, in advance, all license fees and charges required of it to transact its said business in said state, all as required by sections 6328, 6437 and 6438, Oregon Laws (Insurance Code aforesaid), and each of said plaintiffs having in all other respects complied with the insurance laws of said state of Oregon, the then insurance commissioner of said state did issue to each of said plaintiffs a certificate of authority and license to transact its said business with said state, and * * * each of said plaintiffs has been at all times herein mentioned and still is duly and legally qualified to transact such business in the state of Oregon, and now has a license from said Insurance Commissioner so to do."

Clearly, this language above quoted specifies only the insurance business of surety and guaranty. It does not contain any allegation whatever of the qualifications, if any, of the appellees to engage in any other insurance business, including contracts of indemnity. Section 6328, Oregon Laws, as amended by chapter 155, General Laws of Oregon, 1921, states the general requirements of foreign insurance companies to obtain authority to transact the insurance business in the state of Oregon, while sections 6437 and 6438, Oregon Laws, all cited in the foregoing portion of appellees complaint, provide the conditions under which surety companies may do business in said state, and relate only to such companies and such business. Said three sections are, for convenience, set forth in appendix A attached to, and made a part of, this brief. An examination of said last two sections clearly shows that compliance with their requirements only authorizes insurance

companies to transact the surety business as therein specified, and it is specifically provided among other things, in paragraph 1 of said section 6437, Oregon Laws:

“ * * * If such surety company is engaged in any other business it shall pay fees in addition to the above license for the license or licenses required by law for the transaction of such other insurance business. * * * ”

The complaint nowhere alleges that any of the appellees have complied with this requirement or qualified to transact any other insurance business in the state of Oregon than the business of surety and guaranty insurance. In paragraph 3 of said section 6438, Oregon Laws, after specifying the phases of the surety and guaranty insurance business which may be transacted by a foreign surety company which has qualified as such, this language appears:

“ * * * and generally, it shall be lawful for such a company or corporation to enter into any contract of indemnity or security with any person, partnership, association or corporation; provided, that such contract is not otherwise prohibited by law or against public policy.”

It is noticed that this language contains the word, “indemnity.” The rule of *ejusdem generis* is so well settled as not to permit of citation of authority at this time; that is, where several acts or things, such as kinds of business are specified in a statute and general authority is given to perform other acts or transact other business, such other acts or business must be within the same kind or class as those particularly specified. This rule and its application in the present instance is strengthened by the fact that the expression is “indemnity or security,” showing that the indemnity is of the nature of security, which is a part of the surety or guaranty business authorized in said paragraph.

Manifestly, the contracts authorized by the clause here quoted could not include life insurance, fire insurance and other well-defined classes of insurance known to the law. Therefore, the words "any contract of indemnity or security" do not widen the scope of the authority conferred in said section beyond those of the kind specified.

Particular attention is called to the concluding clause in the last above quotation. "provided that such contract is not otherwise prohibited by law or against public policy." We have already discussed the question of public policy, and we here call attention to the fact that the statutory provision upon which appellees apparently rely restricts them from making contracts contrary to public policy, and thus recognizes the effect of public policy which we have already urged upon the court. We will also discuss the nature of business forbidden by law to be transacted by surety companies, in a succeeding paragraph.

When the allegations of the complaint, including the statutory provisions sought to be imported into it by reference, setting forth the kind of business which they claim they are authorized to transact, are considered, the conclusion can not be escaped that they have pleaded themselves out of court in so far as it concerns the transaction of any kind of insurance business other than surety or guaranty. We have already shown by competent authority that the contracts now under consideration are of the class of indemnity, and not surety or guaranty, and even if they were, which we do not admit, they are not of the kind particularly specified in the complaint or in the statutory provisions therein cited.

(b) In addition to what has already been shown as to the lack of authority of appellees to make the indemnity contracts in question, we now call attention to the fact

that the statutes of the state of Oregon do not authorize them to do so. Section 6322, Oregon Laws, defines insurance generally as follows:

“Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event, whereby the insured or his beneficiary suffers loss or injury.”

This general definition is limited by the provisions of section 6337, Oregon Laws, classifying and defining the various kinds of insurance which may be transacted in the state of Oregon, reading, so far as pertinent, as follows:

“Definition of Insurance. (1) *Of Insurance Company.* A company, association, partnership or individual engaged in the business of insurance, or suretyship, or of guaranteeing against liability, loss or damage, or of entering into contracts substantially amounting to insurance, shall be deemed an insurance company and shall not transact such business unless the business is authorized or permitted by the laws of the state of Oregon, and all laws regulating the same and applicable thereto have been complied with.

“(2) *Classification and Separation of.* A company may be licensed to make any or all insurance and reinsurance comprised in any one of the following numbered subdivisions:

“First. *Fire and Marine Insurance.* * * *

“*Vessels and Common Carriers.* * * *

“Second. *Life Insurance.* * * *

“Third. *Disability Insurance.* * * *

“Fourth. *Casualty Insurance.* * * *

“Fifth. *Surety Insurance.* Guaranteeing the fidelity of persons holding places of trust, the performance of contracts and bonds and undertakings, including the signing thereof as surety. * * *

This particular definition of surety insurance is the exact language used by appellees in their complaint (R. 1) as being the kind of insurance which they are qualified to transact in the state of Oregon. This, in connection with the statutory provisions relied upon by appellees in their complaint, already discussed herein, limits the kind of insurance which a surety company may transact in the state of Oregon, and this term, without any question whatever, includes the appellees herein.

The district court, in his opinion (R.11) relies upon certain provisions of sections 6338 and 6343, Oregon Laws. Said section 6338 reads as follows:

“(1) Any insurance company which has qualified to transact its appropriate business in this state may be licensed to transact any of the classes of insurance defined in this section or permitted under the laws of this state and which it may transact under the provisions of its charter or articles of incorporation and the laws of the state in which it has its home office or United States department office. (2) Provided, that if such company elects to transact more than one of such classes of insurance, it shall be required to pay an additional fee of \$25 per annum for each of such additional classes as it may be authorized to transact under its certificate of authority and the annual license which may be issued to it.”

The district court, in his opinion, quotes only the first sentence of said section and omits the important provision contained in the second sentence, requiring any insurance company wishing to transact any additional class of business to qualify by paying an additional license fee, and that such additional business must be one which it is authorized to transact under its certificate of authority. Said section 6343 enumerates the various kinds of insurance which may be transacted in the state of Oregon, and

adds, "and insurance against any other loss or casualty which may lawfully be the subject of insurance and for which no other provision is made by the laws of this state." This is the language quoted from said section (R. 11) by the district court. It is noticed, however, that such language does not specify that every insurance company, without exception, may transact any other kind of insurance, as stated in the foregoing quotation, without complying with the requirements authorizing it to transact an additional kind of insurance. Said requirements being specified in section 6338, Oregon Laws, above quoted, and section 6437, Oregon Laws, shown in appendix A, and already discussed in a preceding paragraph.

Clearly, therefore, the language of neither of said sections 6338 and 6343, Oregon Laws, adds anything to the authority of appellees, or any surety company qualified only to transact the surety or guaranty business in the state of Oregon.

It can not be questioned that a state has the right to prescribe the terms upon which a foreign insurance company can transact business within its borders, and that such foreign company can transact only such business as the law of the state authorizes. This rule is well stated in the following quotation from 32 C. J., p. 989, § 21:

"The state has power either wholly to exclude a foreign insurance company from doing business within its limits or to impose on the company such terms and conditions as it may deem proper as a condition precedent to its right to do business within the state.

* * * * *

"On compliance with the laws of a state a foreign company is entitled to carry on business in that state, but it can only do such business as is authorized by the statute, although its charter authorizes a greater scope of business. * * *"

Appellees are, therefore, not denied any right of contract or other property right by being prevented from entering into such confiscation indemnity contracts for the reason that they have not shown any authority in their complaint to make the same, nor do the laws of the state of Oregon relating to insurance authorize such indemnity contracts to be made by surety companies qualified only to transact the surety business.

V

The action of the Insurance Commissioner of the state of Oregon, appellant herein, in issuing said "Department Bulletin No. 25," and in enforcing the same, is not in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In 12 C. J., page 1200, section 966, it is said:

"The right to make contracts is both a liberty and a property right, and is within the protection of the guaranties against the taking of liberty or property without due process of law. Neither the state nor federal governments, therefore, may impose any arbitrary or unreasonable restraint on the freedom of contract. *This freedom, however, is not an absolute, but a qualified, right, and is, therefore, subject to reasonable restraint in the interest of the public welfare.*" (Italics ours.)

In the case of *German Alliance Insurance v. Barnes*, 189 Fed. 769, 775, 778, 779, the court discussed the right of a state to regulate foreign insurance companies doing business within the state, and said:

(p. 775) "It may also be conceded the exercise of the legislative power of fixing or regulating rates and charges for services performed or engagements under-

taken is an appropriation by the state of private property; for it is a taking away from the contracting parties of their right of private contract which is private property. * * *

The court also quoted from the case of *Atlantic Coast Line Co. v. Riverside Mills*, 219 U. S. 186, 31 S. Ct. 164, 55 L. Ed. 167, as follows:

“‘It is obvious from the many decisions of this court that there is no such thing as absolute freedom of contract. Contracts which contravene public policy can not be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests.’”

The court then said:

(p. 779) “Without attempting a further discussion of the proposition relied on by complainant in its elaborate brief and argument, or a reference to the many authorities therein cited and elaborated upon in argument, it will suffice to say in the light of recent decisions, which must control here, I am of the opinion the act challenged does not violate any right secured to complainant by the provisions of the fourteenth amendment to the federal constitution, and that the act will be upheld as within the legitimate exercise of the lawmaking power of the state.”

CONCLUSION

Appellant would sum up his presentation of this matter as follows:

That appellees are not deprived of any right guaranteed to them by the Fourteenth Amendment of the United

States Constitution, as alleged in their complaint and held by the district court, by the issuance of the departmental bulletin in question and its enforcement, revoking and denying their licenses to underwrite the policies of confiscation indemnity specified in said order and involved in this suit because appellees had no right to make such contracts, as judged, (1) by the nature of said contracts, the same being contrary to public policy in that they lend an assistance to, and furnish a material means for, the violation of the laws of the United States and the State of Oregon, and are used extensively for such purpose; (2) by their own pleading in this case upon which they must stand or fall; and (3) by the laws of the State of Oregon specifying the conditions upon which foreign insurance companies may be admitted to transact business in the state of Oregon and the kinds of insurance business which they may transact and the conditions thereof.

We believe we have fully established all of these positions, any one of which is sufficient to reverse the decree of the district court, because said decree, based upon the holding of the court that the insurance in question is lawful surety insurance within the state of Oregon, can not be in accordance with law if any of said points are well taken. We respectfully urge, therefore, that the decree of the district court be reversed.

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